

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|-----------------|---|----------------------------------|
| THE HOPI TRIBE, |) | |
| |) | No. 14-73055 |
| Petitioner, |) | consolidated with Nos. 14-73100, |
| |) | 14-73101, 14-73102 |
| |) | |
| v. |) | |
| |) | |
| U.S. EPA, |) | |
| |) | |
| Respondent. |) | |
| |) | |

**MOTION TO AMEND BRIEFING SCHEDULE AND
TO ESTABLISH BRIEFING FORMAT**

Pursuant to Rule 27 F.R.C.P. and Circuit Rules 27-1 and 28-4, the United States on behalf of Respondent U.S. Environmental Protection Agency, and the Hopi Tribe, Petitioner in Case No. 14-73055, moves: (1) to amend the briefing schedule in these consolidated cases to establish March 16, 2015, as the deadline for opening briefs, (2) to allow the United States 60 days in which to file its response brief, regardless of the date on which Petitioners file their opening briefs, and (3) to establish a briefing format which avoids unnecessary duplication in the parties' briefing.

[state positions of the other parties]

BACKGROUND

On December 9, the United States and Intervenors filed a motion to

consolidate these four cases. While that motion was pending, the United States and Petitioners in No. 14-73102 moved to establish a briefing schedule beginning on February 20, 2015. In that motion the United States represented that the Hopi Tribe, Petitioner in No. 14-73055, agreed with the February 20 proposed date, but that is not correct. Instead, the Hopi Tribe, and the United States, support an opening brief deadline of March 16, 2015. As explained in Argument I.A., below, a March deadline will allow the Hopi Tribe and the United States time to negotiate a resolution of the Hopi Tribe's claim and, if those parties reach an agreement, voluntarily dismiss that aspect of this litigation.

On December 12, 2014, the Court entered an order granting the motion to consolidate, and in addition establishing January 26, 2015, as the deadline for opening briefs, and February 25 for the United States' response. Regardless of whether opening briefs are due January 26, or as the moving parties' request, March 16, the United States requests a period of 60 days in which to file its response. As explained in Argument I.B., below, the United States anticipates that the thirty-day period normally allotted for response briefs will be inadequate.

The United States has discussed a briefing format with Petitioners in all four of the consolidated cases, but has not been able to reach an

agreement. A briefing format that combines multiple petitioners on one brief will conserve judicial resources and is consistent with the local rules on cases involving multiple appellants. As explained in Argument II, below, the United States does not object to the Hopi Tribe filing a separate brief if the Hopi Tribe and the United States are not able to reach a settlement, but the United States believes the private party petitioners should join in a single opening brief and a single reply brief.

ARGUMENT

I. THE COURT SHOULD AMEND THE SCHEDULE

The Court should amend the current schedule for two reasons. First, the Hopi Tribe and the United States are currently discussing settlement. Although it is premature to state whether those parties will reach an agreement, a January 26 deadline for opening briefs does not provide those parties sufficient time to complete their negotiations. Second, the United States anticipates that the 30 days provided for in the current schedule will be inadequate to respond to the Petitioners' merits briefs, regardless of the opening brief deadline. Each basis for this motion is discussed in more detail below.

- A. The settlement discussions between the United States and the Hopi Tribe.

Although the Hopi Tribe and the United States have been discussing settlement and continue to meet in good faith to resolve the Hopi Tribe's petition, the parties have not yet reached a resolution of their dispute. The Hopi Tribe's council, which must review and approve any agreement, does not meet in February, due to its ceremonial calendar. In addition, many of the attorneys and client representatives have pre-arranged leave and travel commitments during the end of year holidays. Thus, due to these unavoidable scheduling conflicts, the earliest that the Hopi Tribe and the United States could likely reach an agreement – or determine that no agreement can be reached – is mid-March, 2015. The proposed amended briefing schedule allows time for those discussions to occur, without unduly delaying briefing in the remaining petitions. Under the current schedule, briefing will be complete on April 8; under the United States' proposal, briefing will be complete on June 11. The United States and the Hopi Tribe do not believe that this extension will materially delay the Court's consideration of the merits of these consolidated cases. In contrast, the extension may allow the parties to resolve the Hopi Tribe's concerns, and remove the need for the parties to brief those issues or the Court to consider them.

Thus, the Hopi Tribe and the United States believe that the requested

briefing schedule will result in more efficient overall administration and briefing of the case and will be beneficial to all of the pending petitions.

B. The deadline for the United States' brief.

The United States anticipates that the 30-day period normally allotted for preparation of a respondent's merits brief will be inadequate in this case, regardless of whether or not the Hopi Tribe and the United States reach a settlement. This case raises potentially complex issues regarding EPA's final rule approving a Clean Air Act Federal Implementation Plan setting new nitrogen oxide emissions limits for the Navajo Generating Station ("NGS"). *See* 79 Fed. Reg. 46,514 (Aug. 8, 2014). The United States' brief will require review by multiple officials, which entails additional time beyond that needed for drafting the brief. This additional time will be necessary whether the United States responds to one, two, or three petitioner briefs.¹ Granting the United States at least 60 days in which to respond to Petitioners' merits briefs will not unreasonably delay these proceedings, nor will it prejudice any party.

C. The proposed schedule.

¹ The petitioner in Case No. 14-73100 is pro se and does not intend to file a brief, so at most the petitioners would file three briefs, although as explained below the moving parties believe the private party petitioners should join in a single brief, while the Hopi Tribe, if they file at all, would file a separate brief.

The Hopi Tribe and the United States therefore move the Court to enter the following schedule:

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|-----------------------------|----------------|
| Petitioners' Opening Briefs | March 16, 2015 |
| U.S Response Brief | May 15, 2015 |
| Intervenors' Briefs | May 29, 2015 |
| Petitioners' Replies | June 11, 2015 |

II. THE COURT SHOULD ESTABLISH A BRIEFING FORMAT

Circuit Rule 28-4 encourages all parties on a side to join in a single brief. Here, the petitioners in Case No. 14-73101 and Case No. 14-73102 should file one brief. Both sets of petitioners are private advocacy groups, and both sets of petitioners have identified the same basic issues: whether EPA's action complies with the regional haze requirements of the Clean Air Act and EPA's regulations, whether EPA's action complies with EPA's Tribal Authority Rule, and whether EPA's action is supported by the administrative record. *Compare* Mediation Questionnaire filed by Petitioners in Case No. 14-73101 (filed Oct. 14, 2014) *with* Mediation Questionnaire filed by Petitioners in Case No. 14-73102 (filed Oct. 13, 2014).

Because Petitioners in Case Nos. 14-73101 and 14-73102 have represented that they are likely to raise similar issues, and they appear have

similarities in the interests, they should not merely coordinate their briefing, they should join in a single brief. A single brief would be the most efficient use of the parties' and the Court's resources in addressing the issues that these Petitioners wish to raise. In contrast, the Hopi Tribe, if they choose to file a brief, is a sovereign entity, and would likely raise issues unique to it, such as the trust and consultation obligations the United States owes to the Tribe. Thus, a separate brief is reasonable for the Hopi Tribe, if it proves necessary. The Petitioner in Case No. 14-73100, a *pro se* petitioner who has been granted leave to proceed in forma pauperis, has stated that he does not intend to file a separate opening brief.

The Petitioners in Case Nos. 14-73101 and 14-73102 should file a joint brief regardless of whether or not the Hopi Tribe and United States are able to reach a settlement. If the Hopi Tribe and the United States do settle, the remaining parties may be granted an additional 1,400 words for their joint brief. *See* Circuit Rule 28-4. If the Hopi Tribe and the United States do not settle, and the Hopi Tribe elects to file a brief, the Petitioners in Case Nos. 14-73101 and 14-73102 should still file a joint brief. However, in that situation, the petitioners should be limited to two standard size briefs, with 14,000 words for the Hopi Tribe and 14,000 words for the joint brief of Petitioners in Case Nos. 14-73101 and 14-73102.

The United States therefore proposes the following format:

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|--|---------------------------------------|
| Petitioners in Case Nos. 14-73101 and 14-73102 | 15,400 words in a joint opening brief |
| Petitioner in Case No. 14-73055 | 14,000 words in a separate brief |
| Respondent | 29,400 words |
| Petitioners in Case Nos. 14-73101 and 14-73102 | 7,700 words in a joint reply brief |
| Petitioner in Case No. 14-73055 | 7,000 words in a separate reply |

THEREFORE, the Hopi Tribe and the United States respectfully request an Order from the Court: (1) adopting the proposed amended briefing schedule, with March 16, 2015, as the deadline for opening briefs; (2) allowing the United States 60 days in which to file its response brief, regardless of the date on which Petitioners file their opening briefs; and (3) adopting the proposed briefing format which requires Petitioners in Case Nos. 14-73101 and 14-73102 to join in a single opening and a single reply brief.

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General
Environment & Nat. Resources Div.

/s/ Daniel R. Dertke
DANIEL R. DERTKE

United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-0994
Fax: (202) 514-8865
daniel.dertke@usdoj.gov

Attorney for Respondent

/s/ Anne Lynch

Anne Lynch

Michael D. Goodstein

HUNSUCKER GOODSTEIN PC

5335 Wisconsin Ave. NW, Suite 360

Washington, DC 20015

Telephone: (202) 895-5380

Marc A. Shapp

HUNSUCKER GOODSTEIN PC

3717 Mt. Diablo Blvd., Suite 200

Lafayette, CA 94549

Telephone: (925) 284-0840

Facsimile: (925) 284-0870

*Attorneys for Petitioner The Hopi
Tribe*

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